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## State Involvement in Private Discrimination Under the Fourteenth Amendment

### INTRODUCTION

The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In the *Civil Rights Cases*<sup>1</sup> the United States Supreme Court made it clear that this amendment places no restrictions on the acts of private individuals.<sup>2</sup> This decision merely gave expression to the dichotomy implicit in the language of the amendment. Accordingly, there are state acts, which may or may not violate the fourteenth amendment, and there are private acts which in no case violate the amendment. Despite this superficially clear distinction the division between state and private action still wants for precise definition more than seventy-five years after the decision of the *Civil Rights Cases*.

To a large extent this is due to the abstract nature of the state's being. Since it exists only in the minds of men, the state cannot act itself, but must rely upon men to perform its functions.<sup>3</sup> This necessitates a separation of the acts of men which are to be attributed to the state from those which are to remain merely acts of private citizens. The task of deciding to whom a particular act is to be attributed is made harder because it is at times difficult to draw a clear distinction between acts authorized by the state government and those which are simply permitted under state law.<sup>4</sup> A further complication of the cases involving fourteenth amendment questions has been the fact that the policy which guides the Supreme Court in expounding

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1. 109 U.S. 3 (1883).

2. The Court in the *Civil Rights Cases* drew upon the opinions of three prior cases in its interpretation of the fourteenth amendment: *Ex parte Virginia*, 100 U.S. 339, 347 (1880) ("Whoever, by virtue of public position under a State government [denies due process or equal protection] . . . violates the constitutional inhibition."); *Virginia v. Rives*, 100 U.S. 313, 318 (1880) ("The provisions of the Fourteenth Amendment . . . all have reference to State action exclusively, and not to any action of private individuals."); *United States v. Cruikshank*, 92 U.S. 542, 554 (1875) ("[The clauses of the amendment do not] add any thing to the rights which one citizen has under the Constitution against another. . . . The only obligation resting upon the United States is to see that the States do not deny the right.").

3. See, e.g., PETRAZYCKI, *LAW AND MORALITY* (1955).

4. Cf. Comment, *Race Discrimination in Housing*, 57 YALE L.J. 426, 434 (1948), where it was suggested that "The difficulty in thinking of any private rights independent of recognition and protection by government, indicates that 'public' and 'private' are not separate compartments but titles for opposing ends of a continuous spectrum."

the Constitution dictates against rigid definition of such concepts as those contained in the amendment. The flexibility of the state action concept has played an important part in enlarging the ambit of protection of the fourteenth amendment.

However, it must be emphasized that the uncertainty attending an adjudication under the fourteenth amendment is not necessarily eliminated by a determination of the state action issue. For if it is found the state has acted, there remains the further inquiry as to whether the act in question denied due process or equal protection of the laws.

Despite these difficulties, there are certain areas of litigation in which unconstitutional state action is fairly well defined. Thus, it is definitely established that ministerial acts of the state judiciary,<sup>5</sup> or acts of the state legislature<sup>6</sup> which contravene the due process or equal protection guarantees are prohibited by the fourteenth amendment. Later cases indicate that the amendment prohibits not only discriminatory state statutes, but also private acts in accordance with these statutes.<sup>7</sup> Discriminatory acts of state executive officers have been declared unconstitutional,<sup>8</sup> whether the officer acted pursuant to state law,<sup>9</sup> con-

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5. *Ex parte* Virginia, 100 U.S. 339 (1880) (state action found where a state judge excluded Negroes from state juries).

6. *Strauder v. West Virginia*, 100 U.S. 303 (1880) (unconstitutional state statute provided that only white persons could serve as jurors). *Cf.* cases invalidating city ordinances which attempt to zone residential property on the basis of race: *Richmond v. Deans*, 281 U.S. 704 (1930); *Harmon v. Tyler*, 273 U.S. 668 (1927); *Buchanan v. Warley*, 245 U.S. 60 (1917).

7. *Traux v. Raich*, 239 U.S. 33 (1915) (unconstitutional state statute required employers of five or more workers to hire at least eighty percent native-born citizens of the United States). *Cf.* *Flemming v. South Carolina Electric & Gas Co.*, 224 F.2d 252 (4th Cir. 1956) (state action found where a bus driver required a Negro to change seats in accordance with state law). There is also room for strong argument that private organizations specially empowered by the state, e.g., labor unions designated as collective bargaining agents, must abide by the prohibitions of the amendment. For cases holding that a labor union, in deriving its power to negotiate from Congress, must operate within the confines of the fifth amendment: *Syres v. Oil Workers International Union*, 350 U.S. 892 (1955); *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *James v. Marinship Corp.*, 25 Cal.2d 721, 155 P.2d 329 (1944); *Betts v. Easley*, 161 Kan. 459, 160 P.2d 831 (1940).

8. It should be noted that the definition of state action as discussed in this Comment is not controlling for purposes of defining the restrictions placed upon suits against a state by the eleventh amendment. *Ex parte* Young, 209 U.S. 123 (1907) established that the federal courts can protect the constitutional rights of persons under the fourteenth and fifteenth amendments where these rights are impaired by state officers. The theory is that assertion of these rights against the officers is not a suit against the state, but one against individuals who are acting beyond their authority. However, these acts, because committed under color of state law, fall within the ambit of the fourteenth and fifteenth amendments.

9. E.g., *Sterling v. Constantin*, 287 U.S. 378 (1932) (Governor of Texas en-

trary to state law,<sup>10</sup> or whether he improperly enforced a valid state law.<sup>11</sup>

The purpose of this Comment is the analysis of problems created by the employment of the state action concept in three areas of difficulty. Discussed first will be state enforcement of private discrimination. The primary inquiry here is what state act constitutes a denial of due process or equal protection under the fourteenth amendment. The two other areas deal with state inaction and state proprietary involvement in private discrimination. In these areas the major question is what constitutes state action.

#### FOURTEENTH AMENDMENT VIOLATIONS RESULTING FROM STATE ENFORCEMENT OF PRIVATE DISCRIMINATION

Prior to the *Shelley v. Kraemer*<sup>12</sup> decision in 1948 it was generally believed that judicial enforcement of private discrimination did not constitute state action.<sup>13</sup> Although the case of *Marsh v. Alabama*<sup>14</sup> has been explained as an earlier recognition that state court enforcement of private discrimination is unconstitutional,<sup>15</sup> this holding does not appear to have been expressed in the opinion. In the *Marsh* case the Supreme Court reversed

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joined from enforcing confiscatory regulations of oil production); *Ex parte Young*, 209 U.S. 123 (1907) (federal court could enjoin state executive officer from enforcing state railroad rate statute). *Cf.* *Mooney v. Holohan*, 294 U.S. 103, 113 (1935).

10. See *Williams v. United States*, 341 U.S. 97 (1951) (private detective who flashed a special badge issued him and was accompanied by a policeman acted "under color" of state law in obtaining confessions by beating suspects); *Screws v. United States*, 325 U.S. 91 (1945) (acts of a sheriff who beat a prisoner in violation of his duties under state law, thereby causing his death, were state action). See also *Crews v. United States*, 169 F.2d 746 (5th Cir. 1947); *Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949); *Apodaca v. United States*, 188 F.2d 932 (10th Cir. 1941). *But see* *Watkins v. Oaklawn Jockey Club*, 183 F.2d 440 (8th Cir. 1950) (public officers who were hired by private company and who were not purporting to act as police officers were not acting under color of Arkansas law).

11. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invalidated municipal ordinance valid on its face but applied discriminatorily against Chinese); *Neal v. Delaware*, 103 U.S. 370 (1880) (systematic exclusion of Negroes from state juries).

12. 334 U.S. 1 (1948). See also the companion case of *Hurd v. Hodge*, 334 U.S. 24 (1948) (a decision under federal statute invalidating enforcement of racial covenant by lower federal court in District of Columbia).

13. See, e.g., *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 Pac. 596 (1920); *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915). *But see* *Grandolfo v. Hartman*, 49 Fed. 181 (S.D. Cal. 1892).

14. 326 U.S. 501 (1946). See *Tucker v. Texas*, 326 U.S. 517 (1946) (companion case).

15. E.g., Horowitz, *Misleading Search for State Action*, 30 So. CALIF. L. REV. 208, 217 (1957); Note, 73 HARV. L. REV. 1216, 1218 (1960), noting *State v. Williams*, 37 CCH Lab. Cas. ¶ 65708 (Balt. Crim. Ct. 1959).

the trespass conviction of a Jehovah's Witness who was arrested for handing out religious tracts on the streets of a company town contrary to the wishes of its owner. The Court did not specify exactly what conduct was found to be constitutionally objectionable, but chose instead to place significance on the rights that had been denied. It was stated that the first amendment freedoms of speech and religion of the Witness had been unjustifiably impaired, the Court intimating that free speech had also been denied by preventing communications to the citizenry of the town. In addition the Court noted that the street appeared to be one on which free speech could be practiced and that the company, by holding the property open to public use, had suffered a diminution in its rights to enforce private discrimination. With no express language to the effect, it would seem unreasonable to conclude that the *Marsh* opinion amounted to a holding based primarily on judicial enforcement of private discrimination. Rather, the decision would appear to be more dependent upon the special facts of the case than upon any far-reaching state action doctrine.

The *Shelley* case joined for review two identical state court decisions.<sup>16</sup> In both instances Negroes had purchased and taken possession of property subject to a covenant which forbade its purchase or occupancy by Negroes. The state court in each case upheld the restrictive covenant and ordered the Negroes off the property. The Supreme Court held that a state court's enforcement of a racially restrictive covenant was a violation of the equal protection clause of the fourteenth amendment. This holding makes it clear that state enforcement of private acts constitutes state action. Thus the new basis for inquiry is whether the state action in enforcing a particular private discrimination amounts to a denial of equal protection.

Since the decision in *Shelley v. Kraemer* the Court has considered only one case in this area. In *Barrows v. Jackson*<sup>17</sup> the Court affirmed a California decision denying a suit for damages resulting from the breach of a racially restrictive covenant. This case, in which the author of the *Shelley* opinion dissented, does little more than invalidate an alternate method of judicial enforcement of racial covenants. Consequently, the precise limits

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16. *Sipes v. McGhee*, 316 Mich. 614, 25 N.W.2d 638 (1947); *Kraemer v. Shelley*, 355 Mo. 814, 198 S.W.2d 679 (1947).

17. 346 U.S. 249 (1953).

of the *Shelley* decision have not been drawn by the Supreme Court.

Under the fourteenth amendment a denial of equal protection occurs when the state makes an *unreasonable*<sup>18</sup> distinction in the promulgation or application of its laws. From *Brown v. Board of Education*<sup>19</sup> and its progeny<sup>20</sup> it is now clear that a distinction drawn solely on the basis of race is unreasonable and thus unconstitutional. Because *Shelley v. Kraemer* held that a state court enforcement of a racial covenant denied equal protection, there is some basis for saying that this case stands for the proposition that state enforcement of private racial discrimination amounts to the drawing of an unreasonable, and therefore unconstitutional, distinction by the state.<sup>21</sup>

However, because the state court in *Shelley* did not draw the initial distinction, but merely enforced the racial discrimination of a private person, this case is not completely analogous to one where the state has required school attendance to be on a racially segregated basis or in some other way acted pursuant to its own racial distinction. It would seem that a valid rationale of the *Shelley* decision could be set forth which would not result in counting every enforcement of a private discriminatory act as being a denial of equal protection. This rationale has been derived by comparing the facts of the *Shelley* case with those presented in several later state court cases.

In *Rice v. Sioux City Cemetery*<sup>22</sup> the Iowa court enforced a racially discriminatory exclusion clause in a burial contract

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18. E.g., *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911): "The equal protection clause of the fourteenth amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary."

19. 347 U.S. 483 (1954). See *Bolling v. Sharpe*, 347 U.S. 497 (1954). (companion case).

20. E.g., *New Orleans City Park Improvement Association v. Detiege*, 252 F.2d 122 (5th Cir. 1958), aff'd, 358 U.S. 54 (1958); *Dawson v. Mayor and City Council of Baltimore*, 220 F.2d 386 (4th Cir. 1955), aff'd, 350 U.S. 877 (1955); *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), aff'd, 325 U.S. 903 (1956).

21. *Of. Black v. Cutter Laboratories*, 351 U.S. 292, 300 (1956) (dissenting opinion). In the *Black* case the California court refused to reinstate a communist employee. The majority of the Supreme Court dismissed the case on the ground that no substantial federal question was presented. But the dissenting opinion found that the California court approved of the employee's dismissal because she was a communist and said that this violated the first amendment guarantees of the employee under the fourteenth amendment, citing *Shelley v. Kraemer*.

22. 349 U.S. 70 (1955). In this case the Court initially granted certiorari, but was evenly divided on the initial hearing of the case. On rehearing, the Court took notice that Iowa had passed a statute after the case arose which did not affect the question presented, but presumably prevented its recurrence in the

against the widow of a Winnebago Indian. The suit was brought for breach of contract after the cemetery refused to bury the deceased because he was not a Caucasian. The state court in *Gordon v. Gordon*<sup>23</sup> enforced a religiously discriminatory condition included in a private trust. An heir, otherwise entitled to participate in the benefits of the trust, was excluded because he had married a gentile contrary to the terms provided by the testator. The same year another state court enforced the reversion of property donated for a public park pursuant to a racially discriminatory reversion clause.<sup>24</sup> The donor had provided that the property should revert to his ownership if ever it were subjected to use by Negroes. In the *Girard*<sup>25</sup> case the Pennsylvania court enforced the racial discrimination of the directors of a private trust. Negroes were refused admittance to a private school administered by the trust.

In the *Shelley* case and in each of the state cases discussed the interest in equality of the party discriminated against was opposed by the discriminating party's interest of freedom in the use of private property. The *Shelley* decision makes it clear that the free use of property will not be protected at the expense of equality where the property owner seeks to enforce a racial covenant. However, the state cases, which do not involve the enforcement of restrictive covenants, differ from the *Shelley* case both analytically and practically.

It would seem that the difference in theory is that *Shelley*, unlike the state cases, presented a state court enforcement of a contract to practice racial discrimination. Since a binding contract has the force of law between the parties, it would appear that it should be subject to the same constitutional scrutiny by the courts as is the law enacted by the legislature. Therefore, if the law enforced by the court, whether contractual or public, draws an unreasonable distinction, e.g., one based on race alone, the enforcement of such a law should be a denial of equal protection under the fourteenth amendment. However, the above state cases do not enforce contracts to discriminate but merely

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State of Iowa. On this basis, the Court, feeling a federal question of substance had not been presented, dismissed the writ of certiorari as improvidently granted.

23. 332 Mass. 193, 124 N.E.2d 226 (1955), cert. denied, 349 U.S. 947 (1955). See *United States National Bank of Portland v. Snodgrass*, 202 Ore. 530, 275 P.2d 860 (1954).

24. *Charlotte Park and Recreation Commission v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), cert. denied, 350 U.S. 983 (1956).

25. *In re Girard College Trusteeship*, 231 Pa. 434, 138 A.2d 844 (1958), cert. denied, 357 U.S. 570 (1958).

protect the voluntary indulgence in racial discrimination by an individual in the disposition of private property. Thus it would seem these cases do not constitute enforcement of unreasonable law but are instead illustrations of the protection of a desirable privilege. To hold otherwise, it seems, would effect an unwarranted restriction of the freedom traditionally thought to be inherent in the enjoyment of private property.

Perhaps the difference between the *Shelley* case and the state cases discussed is more easily seen in effect than in theory. In the *Shelley* case the Negroes acquired property from a willing vendor, thus making it impossible for the other covenanting parties to effectuate their discriminatory desires without the assistance of the state. In the later cases the discrimination was at least potentially successful without soliciting the aid of the state tribunal.

The state court decisions reviewed in *Shelley v. Kraemer* necessarily took cognizance of a racial distinction in enforcing the restrictive covenants. But in the other state cases the courts merely recognized the right to exercise freedom of choice in the disposition of property.

Even more important from the practical standpoint is the fact that in *Shelley* the enforcement of the restrictive covenant in the state courts had consequences extending far beyond the parties to the discriminatory agreement. The enforcement of racially restrictive covenants would conceivably permit the accomplishment of residential zoning on a racial basis through state enforcement of private agreements. The Supreme Court, in *Buchanan v. Warley*,<sup>26</sup> declared residential zoning on the basis of race to be unconstitutional when achieved by a city ordinance. On the other hand, it would seem the voluntary refusal of a property owner to sell property on the basis of race is less objectionable than the organized withholding of property from certain races that is compelled by statute or contract. Because the uncoerced refusal to sell property to a non-Caucasian is largely discretionary and therefore subject to change, it would seem that such a deprivation does not pose nearly as great a threat to the interests of minority classes as does the enforceable covenant or statute. If the distinction between the enforcement of private agreements to discriminate and the vindication of

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26. 245 U.S. 60 (1917).



autonomous discrimination is unclear in theory, it seems sufficiently apparent in the practical results reached in each case.

Discovering the true meaning of *Shelley v. Kraemer* assumes added importance in view of the recent advent of the Negro "sit-in" demonstrations. Within the past year the practice of sitting at lunch counters on private property in protest of a local custom of no service to Negroes has gained national attention on numerous occasions.<sup>27</sup> In some instances the Negroes have been arrested and convicted under the state trespass laws.<sup>28</sup> Whether enforcement by the state court of the trespass statute to aid private businesses to discriminate solely on the basis of race amounts to a denial of equal protection of the laws is largely an untried and unsettled question.<sup>29</sup>

Of course if the rule of *Shelley v. Kraemer* prohibits state enforcement of all private acts of discrimination, then the arrest and conviction of Negro "sitters-in" under state trespass laws are likely to be unconstitutional. However, under the analysis set forth in this discussion sit-in activity would not be spared from the operation of state trespass laws, as the enforcement of such a law does not involve the enforcement of a contract to discriminate on an unreasonable basis. The state law would be invoked simply to give effect to the private property owner's voluntary choice not to serve people of a particular race.<sup>30</sup>

Although under the instant analysis the operation of trespass statutes against sit-in demonstrators does not come within the ambit of the *Shelley* holding, it is possible that protection of

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27. See Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 DUKE L.J. 315.

28. *State v. Cooke*, 248 N.C. 485, 103 S.E.2d 846 (1958) (Negroes convicted for unlawful entry upon a golf course); *State v. Clyburn*, 247 N.C. 455, 101 S.E.2d 295 (1958) (Negroes convicted for refusal to leave portion of building set aside for white patrons only). Cf. *Chicago v. Corney*, 142 N.E.2d 160 (Ill. App. 1957) (anti-discrimination statute gave defendants a right, superior to the rights of the owners of a tavern, to enter and wait for service).

29. Compare Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 DUKE L.J. 315, for a discussion of the legality of other retaliatory tactics used against the sit-in demonstration, e.g., boycott laws, breach of peace laws, and school expulsion.

30. The right to deny service was recognized by the English common law. *Wood v. Leadbitter*, 13 M. & W. 838, 153 Eng. Rep. 351 (1845). The United States Supreme Court adopted this view in *Marrone v. Washington Jockey Club*, 227 U.S. 633 (1913). Such is presently the law except in the twenty-six states that recently enacted anti-discrimination laws. See GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 101 (1959). Recent cases vindicating the private restaurant owner's right to deny service include: *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (4th Cir. 1959); *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124 (D. Md. 1960).

certain forms of this activity may be included under the aegis of the holding in *Marsh v. Alabama*. The facts presented by the typical sit-in case are in several ways similar to those in the *Marsh* case. In both, a form of peaceful practice of speech is terminated by the enforcement of state trespass laws. Private property more or less open to public use is the scene of the suppression in each case. However, it is arguable that the circumstances of the typical sit-in demonstration do not present as strong a demand for constitutional protection of minority rights as do those of the *Marsh* case. In the first place, the curtailment of lunch counter demonstrations amounts to little more than a negligible infringement of the demonstrator's right to free speech. He may propound his views in the streets as did the Jehovah's Witness in the *Marsh* case.<sup>31</sup> It is probably true that presently no means of dissemination provides the Negro a method of capturing public attention as effectively as does the sit-in demonstration. However, even the protection of free speech must be tempered by the consideration of other highly regarded interests.<sup>32</sup> Consequently, the law cannot always guarantee the most effective forum to one who proposes to exercise the right of free speech.<sup>33</sup> The lunch counter demonstrators, as other inhabitants of this country, would appear entitled only to an adequate opportunity to voice their ideas.

More important than the speech dissimilarities is the smaller degree to which private property such as a dime store is open to public use as compared to a company town. In *Marsh* the Court placed much significance on the fact that the Witness was justified in believing she had a right to proselytize on the company town streets because one has a constitutional right to speak in the public streets.<sup>34</sup> But a private store is open for limited hours and invitation to enter is extended only for purposes conducive to the economic interest of the proprietor. No

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31. See *Follet v. McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Largent v. Texas*, 318 U.S. 418 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Schneider v. State*, 308 U.S. 147 (1939); *Hague v. CIO*, 307 U.S. 496 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938).

32. See *Feiner v. New York*, 340 U.S. 315 (1951).

33. See *Breard v. Alexandria*, 341 U.S. 622 (1951); *Martin v. Struthers*, 319 U.S. 141, 147 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940); *Watchtower Bible & Tract Society v. Metropolitan Insurance Co.*, 297 N.Y. 339, 79 N.E.2d 433 (1948); *Hall v. Commonwealth*, 188 Va. 72, 49 S.E.2d 369 (1948), appeal dismissed, 335 U.S. 875 (1948).

34. See note 31 *supra*.

one is justified in assuming he has a constitutional right to receive service or remain against the owner's will.<sup>35</sup>

The arguments against analogizing the typical sit-in situation to the *Marsh* case are, however, not as compelling when applied to other forms of activity which may be classified loosely as sit-in demonstrations. Perhaps the case most closely resembling the *Marsh* fact situation would be that of picketing on the sidewalks of a private shopping center.<sup>36</sup> In such a situation both the variables of free speech and public dedication seem to be more in the demonstrator's favor. By ignoring the prominent free speech element in *Marsh v. Alabama* it would seem possible to extend its holding even farther to situations which present primarily a use of private property which has been effectively dedicated to public use. Likely activities falling within this category would include demonstrations of the sit-in variety in privately owned hotels or restaurants which essentially purport to serve the travelling public. Such an extension would appear, however, to be subject to the same criticism that may be directed at the *Marsh* holding, without enjoying any of its major virtues. Thus protection of sit-in activity in such situations, as the *Marsh* decision, would appear to present undesirable government intervention in private affairs with only the stop-gap requirement of public dedication barring further impositions. But unlike *Marsh*, the protection of an important free speech interest is lacking in the protection of sit-in activity in hotels and restaurants.

#### FOURTEENTH AMENDMENT VIOLATIONS RESULTING FROM STATE PROPRIETARY INVOLVEMENT IN PRIVATE DISCRIMINATION

Mr. Justice Harlan's dissent in the *Civil Rights Cases*<sup>37</sup> proposed a theory whereby very little involvement of the state government in private affairs would cause those affairs to become public for purposes of the fourteenth amendment. Although the Supreme Court has since remained silent on this issue, the state and lower federal courts have required that a substantial involvement be established between the state and a private agency for the acts of the private agency to constitute state action. But as yet no formula has evolved whereby it may

35. See notes 28 and 30 *supra*.

36. See *State v. Williams*, 37 CCH Lab. Cas. ¶ 65708 (Balt. Crim. Ct. 1959), noted in 73 HARV. L. REV. 1216 (1960).

37. 109 U.S. 3, 26 (1883).

be determined exactly what degree and kind of involvement will be deemed substantial.

The cases abound with tests, most of which have little application beyond their own particular fact situations. Nevertheless, there is discernible a pattern of emphasis upon certain factors in the opinions, the most frequently discussed being state control of the private enterprise. Indeed it would seem that the courts' inquiries in these cases, when expressed, are directed generally toward whether the private enterprise is substantially controlled by the state. But again the meaning of "substantial" is not precisely defined and would seem to vary from court to court.

The federal court of appeals in *Kerr v. Enoch Pratt Free Library*<sup>38</sup> reversed a federal district court which found no state action where a privately operated library refused a Negro admission to a library training class. Although the library was administered by a private board of governors the court of appeals found the City of Baltimore exerted substantial control over the library's operation by regulatory requirements presumably attached to large subsidies received annually by the library from the city. Later cases indicate that state aid alone will not cause the private agency's acts to come within the ambit of the fourteenth amendment, but that there must be de facto control over the operations of the private agent.<sup>39</sup>

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38. 149 F.2d 212 (4th Cir. 1945), cert. denied, 326 U.S. 721 (1945).

39. In *Eaton v. Board of Managers*, 261 F.2d 521 (4th Cir. 1958), there was no state action where a hospital excluded Negro physicians from courtesy staff privileges even though the land upon which the hospital building stood was donated by the city. The *Kerr* case was distinguished on the basis of lack of control in this case. In *Hackley v. Art Builders, Inc.*, 179 F. Supp. 851, 857 (D. Md. 1960), developers of a private housing project could deal with whom they pleased and their decision not to sell to Negroes was not state action because of benefits received from the state metropolitan commission. The opinion stated: "The only case to the contrary, *Ming v. Hogan*, Sup. Ct. Sacramento, Cal., 3 Race Rel. L. Rep. 693, is not legally persuasive. If the rule contended for by plaintiffs were adopted, where should the line be drawn? Every business, every property owner receives various services from the State and Federal Governments, many of them at less than cost." In *Mitchell v. Boys Club of Metropolitan Police, D.C.*, 157 F. Supp. 101 (D.D.C. 1957), no state action was found, although the club virtually owed its existence to the police department, which volunteered policemen's services while on duty to raise funds and work with the children. The city also donated the use of public buildings and utilities. In this case the court flatly stated: "Government control is the decisive factor in the determination of whether a corporation is public or private and governmental control of the club does not exist." *Id.* at 108. In *Norris v. Mayor and City Council of Baltimore*, 78 F. Supp. 451 (D. Mo. 1948), in a situation similar to the *Kerr* case, involving a mechanical and fine arts college, it was held that there was no state action because there was no governmental control. In *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 519, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950), no state

However, what seems to be presumptive weight of substantial control has been given two other factors. Thus it appears that where the state collusively uses a private party as an agent to achieve an unconstitutional end, or where the state purports to provide a public service by procuring a private party to operate a business on government property, the acts of the private person will constitute state action.

One situation where courts have declared the acts of private parties to be unconstitutional state action is where a city has collusively leased a public swimming pool in order to avoid admitting Negroes.<sup>40</sup> A like result has been reached where a city leased its golf course<sup>41</sup> and where a state leased one of its parks<sup>42</sup> in order to avoid use by Negroes. On the other hand, racial discrimination has been held constitutional when practiced by a private party who acquired property from the state pursuant to a bona fide lease<sup>43</sup> or sale.<sup>44</sup> It should be noted that in these collusive leasing cases it is at least arguable that the act of the state in leasing the property is the state action, not the act of the party to whom the pool, golf course, etc., is leased.<sup>45</sup> Nevertheless, under this interpretation the finding of collusion is still of paramount importance.

A state by awarding a restaurant concession in its air terminal undertakes to provide a service to the public on its property. Accordingly, discriminatory conduct by such concessionaries has been declared unconstitutional.<sup>46</sup> The discrimi-

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action even though the state had used power of eminent domain to get property to convey to Stuyvesant and had granted the corporation a twenty-five year tax exemption.

40. *Lawrence v. Hancock*, 76 F. Supp. 1004 (S.D. W. Va. 1948); *Culver v. Warren*, 84 Ohio App. 373, 83 N.E.2d 82 (1948). Cf. *Kern v. City Commissioners of Newton*, 151 Kan. 585, 100 P.2d 709 (1940).

41. *City of Greensboro v. Simkins*, 246 F.2d 425 (4th Cir. 1957).

42. *Department of Conservation v. Tate*, 231 F.2d 615 (4th Cir. 1956).

43. *Easterly v. Dempster*, 112 F. Supp. 214 (E.D. Tenn. 1953) (bona fide lease of golf course to relieve the city of financial burden); *Harris v. City of St. Louis*, 233 Mo. App. 911, 111 S.W.2d 995 (1938) (valid lease of city auditorium).

44. *Tomkins v. City of Greensboro*, 276 F.2d 890 (4th Cir. 1960) (bona fide sale of city swimming pool).

45. See *Muir v. Louisville Park Theatrical Association*, 347 U.S. 971 (1954). The court of appeals decision which held that acts of a part-time lessee of city amphitheatre were not state action was vacated and remanded for consideration in the light of *Brown v. Board of Education*, although the court of appeals had found no collusion.

46. *Coke v. City of Atlanta*, 184 F. Supp. 579 (N.D. Ga. 1960). Cf. *Anderson v. Moses*, 185 F. Supp. 727 (S.D.N.Y. 1960) (concession of a tavern in New York's Central Park); *Nash v. Air Terminal Services*, 85 F. Supp. 545 (E.D. Va. 1949) (federal air terminal).

natory operation of a cafeteria in a court house building<sup>47</sup> and the segregated management of a theatre in a city hall building<sup>48</sup> have been enjoined by federal district courts. In *Boman v. Birmingham Transit Co.*<sup>49</sup> the federal court of appeals held that the segregation of passengers by a carrier franchised to operate on the streets of Birmingham was unconstitutional. An interesting Delaware case was presented in *Wilmington Parking Authority v. Burton*,<sup>50</sup> where the lessee of building space in a state operated parking facility refused a Negro service in his private restaurant. The court's holding of no state action seems correct in that the Authority by leasing to the tenant did not intend to provide the public with restaurant service but merely sought to obtain revenue essential to the continued operation of the parking installation.

In summary, it would appear that where the state is involved in a private discriminatory act the courts will consider certain factors in deciding whether to invalidate the act under the fourteenth amendment. It would seem that substantial state control is the primary factor in bringing the private act under the ambit of the fourteenth amendment. Apparently, substantial state control may be established by a preponderance of evidence, but presumptive weight will be given collusionary agency with the state or an agency by which the state purports to provide a public service.

#### THE FOURTEENTH AMENDMENT AND STATE INACTION

The opinion in the *Civil Rights Cases* contains language which suggests that the fourteenth amendment can be violated by the state's failure affirmatively to protect individuals against private deprivations:

"Civil rights . . . cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, *customs*, or judicial or executive proceedings. [A private deprivation] if not *sanctioned in some way* by the state [does not deprive a citizen of his rights]."<sup>51</sup> (Emphasis added.)

47. *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), cert. denied, 353 U.S. 924 (1956).

48. *Jones v. Marva Theatres, Inc.*, 180 F. Supp. 49 (D. Md. 1960).

49. 280 F.2d 531 (5th Cir. 1960).

50. 157 A.2d 894 (Del. 1960), appeal to United States Supreme Court pending. See 81 Sup. Ct. 52 (1960).

51. 109 U.S. 3, 17 (1883).

While this possibility seems to have been ignored and impliedly refuted thereafter by the Supreme Court,<sup>52</sup> several federal court of appeals cases discuss the constitutional implications of a state officer's failure affirmatively to protect an individual against the harmful acts of third persons.

Thus in *Cattlette v. United States*<sup>53</sup> the court, after finding that a deputy sheriff was punishable under a federal statute for his active participation in the abusive treatment of a group of Jehovah's Witnesses, announced this opinion:

"It is true that a denial of equal protection has hitherto been largely confined to affirmative acts of discrimination. The Supreme Court, however, has already taken the position that culpable official state inaction may also constitute a denial of equal protection."<sup>54</sup>

However, even as dicta, this statement appears too broad to find support in the cases cited as its authority.<sup>55</sup> Nevertheless, the language was repeated in *Lynch v. United States*<sup>56</sup> where the court affirmed the conviction of two state police officers for releasing prisoners in their custody to a hooded mob with the wilful intent that the prisoners should be beaten by the mob. The case of *Picking v. Pennsylvania R.R.*<sup>57</sup> involved a suit for damages against a railroad and public officers of two states for illegal extradition of plaintiffs. The district court was found to have erred in dismissing the plaintiffs' damage suit against a Pennsylvania justice of the peace for refusing them a hearing upon their arrest prior to extradition to New York. The court of appeals, however, in stating plaintiff's possible cause of action

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52. E.g., *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948): "[T]he restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the fourteenth amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the state and the provisions of the amendment have not been violated." Cf. *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845, 848 (4th Cir. 1959), where the court cited *Shelley v. Kraemer* and stated: "The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment."

53. 132 F.2d 902 (4th Cir. 1943).

54. *Id.* at 907.

55. In *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), it was unconstitutional discrimination for Missouri to provide legal educational facilities within the state for Caucasians only. This would seem to be clearly affirmative discrimination. In *McCabe v. A., T. & S.F. Ry.*, 235 U.S. 151 (1914), allegations in suit contesting the Separate Coach Law of Oklahoma were held to be too vague and indefinite to warrant the relief sought by complainants.

56. 189 F.2d 476 (5th Cir. 1951).

57. 151 F.2d 240 (3d Cir. 1945).

seems to rely on the possible affirmative acts of the justice of the peace:

"The refusal of a state officer to perform a duty imposed upon him by the law of his state because he has *conspired with others in a conscious design to deprive a person of civil rights* . . . may be . . . action taken 'under the color' of the law of the state."<sup>58</sup> (Emphasis added.)

Therefore, in the *Cattlette* and *Lynch* cases where the court talks in terms of state inaction the facts of the cases display affirmative action; and in the *Picking* case where the facts may be said to illustrate state inaction, the theory of the cause of action is expressed in affirmative terms. Furthermore, the state inaction theory, stated or implied in these cases, has not been followed, so that, apparently, a holding under the fourteenth amendment has yet to be grounded squarely on a state's refusal to render affirmative protection against private deprivations.

In contrast, it would seem that the fifteenth amendment does require the state to take affirmative action in making certain that none of its citizens are denied the right to cast an effective ballot because of race, color, or previous condition of servitude. In the white primary cases<sup>59</sup> the Supreme Court fashioned a theory whereby a state is prohibited from allowing a political party which has acquired hegemony to refuse Negroes the right to vote in their private elections. But it would seem that such a theory would have little effect on the prohibition against the state under the fourteenth amendment.<sup>60</sup> The fifteenth amendment would seem to be a narrower and more specific restriction of state power than the fourteenth. For this reason a far-reaching analogy between the two amendments concerning the concept of state action would appear to be somewhat incautious.

In summary it may be said that although the *Civil Rights Cases* suggests that the fourteenth amendment may prohibit

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58. *Id.* at 250.

59. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Grove v. Townsend*, 295 U.S. 45 (1935); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947). *Cf. Gomillion v. Lightfoot*, 81 Sup. Ct. 125 (1960). In this case Negro voters who were removed from the city by a local act which altered the shape of the city from a square to a twenty-eight sided figure had a cause of action under the fifteenth amendment.

60. See *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124, 129 (D. Md. 1960), where a Negro sued a restaurant for denial of service. The court stated: "The distinction between holding a primary election and operating a restaurant is obvious, and has always been recognized by the courts."



state inaction as well as state action, this idea has not been adopted by the federal courts; and that no analogy between the fifteenth and fourteenth amendments should be drawn concerning state inaction.

### CONCLUSION

In deciding cases involving racial controversy under the fourteenth amendment the Supreme Court has not formulated precise rules of law. Such caution would appear desirable where individual rights are newly involved in litigation. But it would seem that when a sufficient amount of jurisprudence has been developed, the formulation of rules is desirable and even necessary if justice is to be done. This Comment does not presume to decide when the time is ripe for laying down rules under the fourteenth amendment but merely purports to provide analysis and suggestions toward this end in cases where the state is involved in private discrimination.

Where the state is involved in a proprietary manner with the person committing the private discriminatory act, the requirement of substantial state control would appear to be a fair rule and one in line with the lower federal court decisions.

In cases where the state has given effect to private discrimination, the best rule would appear to be that, in order to find a violation of the fourteenth amendment, the private racial distinction enforced by the state must have been drawn by a contract to discriminate. Mere voluntary and isolated acts of discrimination do not appear to present a sufficient threat to minority interests to warrant the diminution of property interests that would necessarily result if the minority interests were afforded unlimited protection.

The idea that a state may violate the fourteenth amendment by its inaction alone would not appear to be justified by any sound judicial interpretation of the amendment. The conclusion that such a theory is non-existent is strengthened by the Supreme Court's opinions which appear implicitly to reject the idea. It is submitted that such a position is desirable because the adoption of the contrary position would result in an unwarranted extension of governmental intervention under the fourteenth amendment.

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